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No. 90-793

In the Supreme Court of the United States

OCTOBER TERM, 1990

MANUEL MUNOZ, JR., PETITIONER

v.

DONALD B. RICE, SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
MARLEIGH D. DOVER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether the court of appeals and the district court properly determined that the Air Force had not intentionally retaliated against petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21-34) and the opinion of the district court (Pet. App. 36-51) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1990. The petition for a writ of certiorari was filed on October 16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a civilian employee of the United States Air Force at Kelly Air Force Base, Texas. In March 1983,

he became eligible for a promotion. Upon consideration of eleven qualified candidates, the selection panel chose one of the others. Pet. App. 37-38. On July 31, 1986, after exhaustion of his administrative remedies, petitioner filed a complaint in district court alleging, *inter alia,* that the panel had not selected him in retaliation for numerous prior complaints of discrimination, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a). Pet. App. 22.

After dismissing all but petitioner's Title VII claim, the district court held a bench trial on the merits of that claim. At its conclusion, the court found that while the selection panel members knew of petitioner's history of discrimination complaints, they did not consider or discuss that history, and that petitioner's prior "complaints and cases against the Air Force were not factors in the decision to pass [him] over * * *." Pet. App. 43. The court found further that the candidate who was ultimately selected was better qualified than petitioner, *id.* at 45, and that the Air Force "conclusively established a legitimate, nondiscriminatory justification for [petitioner's] nonselection." *Id.* at 48-49. The district court determined that petitioner had failed even to state a prima facie case, and it ultimately concluded that there was "no evidence of retaliation * * *." *Id.* at 51.

2. The court of appeals affirmed. Pet. App. 21-34. It agreed with the district court that petitioner had failed to state a prima facie case of retaliation by failing to establish a causal connection between petitioner's protected activity and the adverse employment decision. The court of appeals generally affirmed "the district court's judgment and its analysis of the factfindings * * *." *Id.* at 24.

ARGUMENT

Petitioner presented no evidence of retaliation and failed to prove a link between his protected activity and his non-selection. The court of appeals' decision affirming the district court is correct and does not conflict with any decision of this Court or of any court of appeals. Accordingly, further review is not warranted.

Petitioner argues that the district court and the court of appeals erred by addressing whether he stated a prima facie case of retaliation, rather than whether the Air Force in fact retaliated against him. Pet. 15-16. He relies on *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U.S. 711 (1983), in which this Court held that after a trial on the merits of a Title VII action, the court must focus on the ultimate factual issue of discrimination, not on the question of a prima facie case.

Petitioner's contention is incorrect. Although the district court did conclude that petitioner had not shown a prima facie case, it also held that he failed to carry his ultimate burden of proof. The district court determined that petitioner's previous complaints "were not factors" in his non-selection, Pet. App. 43, that the candidate who was chosen was better qualified, *id.* at 45, that the Air Force "conclusively established a legitimate, nondiscriminatory justification" for its selection, and that there was "no evidence of retaliation * * *." *Id.* at 48, 51. The court of appeals affirmed these factual and legal conclusions. Plainly, the district court decided "which party's explanation of the employer's motivation it believes," *Aikens*, 460 U.S. at 716, and properly addressed the question of discrimination. See *id.* at 714, 716.*

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* Thus, petitioner's argument that the district court erred in failing to find a prima facie case of retaliation is irrelevant. Once the trial is complete, that question "drops from the case." *Aikens*, 460 U.S. at

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
MARLEIGH D. DOVER
Attorney

DECEMBER 1990

715, quoting *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 255, n.10 (1981). The court found that petitioner had failed to meet his burden on the "ultimate factual issue in the case." *Aikens*, 460 U.S. at 715.

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